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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF THE STAFF'S
REQUEST FOR APPROVAL OF
COMMERCIAL LINE SHARING
AGREEMENT BETWEEN QWEST
CORPORATION AND COVAD
COMMUNICATIONS COMPANY

DOCKET NO. T-03632A-04-0603
T-01051B-04-0603

**QWEST CORPORATION'S SUPPLEMENTAL BRIEF IN RESPONSE TO
PROCEDURAL ORDER OF JUNE 23, 2006**

I. Introduction

The Procedural Order issued in this matter on June 23, 2006, directs the parties to submit to the Commission any supplemental authorities, additional legal analysis, and procedural recommendations to ensure that the record is current and complete. Qwest Corporation ("Qwest") hereby responds to the Procedural Order by submitting this supplemental brief.

As described in the Procedural Order, this docket arises from Commission Staff's request that the Commission initiate a proceeding to review a commercially negotiated agreement between Qwest and Covad Communications Company ("Covad") titled "Terms and Conditions for Commercial Line Sharing Arrangements" ("Commercial Agreement"). Under the Agreement, Qwest commits to providing Covad with access to the high frequency portion of unbundled loops to permit Covad to offer advanced data services on lines that Qwest is using to provide voice service. Qwest no longer has any obligation under the Telecommunications Act of

1 1996 ("the Act"), through either Sections 251 or 271, to provide competitive local exchange
2 carriers ("CLECs") with access to the high frequency portion of the loop and, accordingly, Qwest
3 entered into the Commercial Agreement voluntarily and through arms-length negotiations with
4 Covad. Because the authority of state commissions to review agreements under Section
5 252(e)(1) is limited to "interconnection agreements" containing ongoing obligations involving
6 the services listed in Sections 251(b) and (c) of the Act, Qwest filed a motion to dismiss Staff's
7 request for review of the Commercial Agreement on September 13, 2004. The parties completed
8 briefing of that motion in October 2004 and, as described in the Procedural Order, submitted
9 various supplemental authorities following the briefing.

10 As described below, there have been two significant developments since the completion
11 of briefing that add further support to Qwest's position that the Commercial Agreement is not an
12 interconnection agreement that is subject to review by the Commission under Section 252. First,
13 on June 9, 2005, the United States District Court for the District of Montana issued a decision in
14 *Qwest Corporation v. Montana Public Service Commission*¹ relating to precisely the same
15 Commercial Agreement and legal issue under consideration here. The court reversed a ruling of
16 the Montana Public Service Commission that required submission of the Commercial Agreement
17 for approval under Section 252, holding that the Agreement is not subject to review by state
18 commissions because it does not contain any obligations relating to the duties described in
19 Sections 251(b) and (c). Second, on September 23, 2005, the FCC issued the *Wireline*
20 *Broadband Order* in which it ruled that DSL transmission service bundled with Internet access is
21 no longer a telecommunications service.² The very purpose of the Commercial Agreement is to
22 permit Covad to offer this type of service. The fact that the service is no longer a

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24 ¹ CV-04-053-H-CSO, Order on Qwest's Motion for Judgment on Appeal (D. Mont. June 9, 2005).

25 ² *In the Matter of Appropriate Framework for Broadband Access to Internet Order Wireless Facilities, et al.*, CC
26 Docket No. 02-33, et al., FCC 05-150, Report and Order and Notice of Proposed Rulemaking (Sept. 25, 2005)
("Wireline Broadband Order").

1 telecommunications service reinforces that the Commercial Agreement is not an interconnection
2 agreement subject to the Section 252 filing requirement, since interconnection agreements are,
3 by definition, limited to agreements entered into by telecommunications carriers to provide
4 telecommunications services.

5 In the discussion that follows, Qwest addresses these decisions, in addition to other recent
6 decisions interpreting the Section 252 filing requirement. For the reasons stated here and in
7 Qwest's prior briefs submitted in this docket, the Commission should determine that the
8 Commercial Agreement is not subject to the filing and review requirements of Section 252 and
9 should close this docket. Furthermore, given the time that has elapsed since the parties
10 submitted their briefs relating to Qwest's motion to dismiss and the fact that several relevant
11 decisions have been issued since then, Qwest believes that additional oral argument would be
12 appropriate.

13 II. Discussion

14 A. The Authority Of State Commissions To Review Interconnection Agreements Under 15 Section 252 Is Limited To Agreements Containing Ongoing Obligations Relating To 16 Section 251 Services, As Confirmed By The Montana Federal District Court's Decision Involving The Commercial Agreement.

17 1. The Section 252 Filing Requirement Is Limited To Agreements Containing 18 Ongoing Obligations Relating To Section 251 Services.

19 As Qwest described in its briefs in support of its motion to dismiss, the Act is clear about
20 the agreements carriers must submit to state commissions for approval. Given the time that has
21 passed since that briefing, a brief review of the Act's filing requirement and the inapplicability of
22 that requirement to the Commercial Agreement may assist the Commission's decision-making
23 process.

24 First, the Act's filing requirement is set forth in Section 252, which is the provision that
25 sets forth the procedures for ILECs and CLECs to enter into interconnection agreements. The
26 Section 252 process, including the filing requirement imposed by that section, is triggered only if

1 there is a "request for interconnection, services, or network elements *pursuant to section 251*."³

2 The linkage between a request "pursuant to Section 251" and the agreements that must be filed
3 under Section 252 is evident from the full text of Section 252(a)(1):

4 Upon receiving a request for interconnection, services, or network
5 elements *pursuant to section 251*, an incumbent local exchange carrier
6 may negotiate and enter into a binding agreement with the requesting
7 telecommunications carrier or carriers without regard to the standards set
8 forth in subsections (b) and (c) of section 251. The agreement shall
9 include a detailed schedule of itemized charges for interconnection and
10 each service or network element included in the agreement. The
agreement, including any interconnection agreement negotiated before the
date of enactment of the Telecommunications Act of 1996, shall be
submitted to the State commission under subsection (e) of this section.
(Emphasis added).

11 Section 252(e)(1) provides further that these negotiated agreements – that is, agreements
12 negotiated based on a request pursuant to Section 251 – shall be filed with state commissions for
13 approval: "Any interconnection agreement adopted by negotiation or arbitration shall be
14 submitted for approval to the State commission."

15 The ILECs' only obligation to negotiate is in response to requests for these Section 251
16 services, as established by Section 251(c)(1), which requires only that ILECs negotiate in good
17 faith "in accordance with section 252" to "fulfill the duties" that are specifically defined in
18 Section 251(b) and (c). As these cross-references in Section 251 and 252 establish, if a
19 negotiated agreement does not involve Section 251 duties, the Section 252 process cannot be
20 triggered and the agreement, as a matter of law, cannot be an "interconnection agreement"
21 subject to the Section 252 filing requirement. Here, it is undisputed that the line sharing element
22 addressed in the Commercial Agreement is not among the unbundled network elements that
23 ILECs are required to provide under Section 251(c)(3), as the FCC ruled in the *Triennial Review*
24 *Order* that line sharing does not meet the "impairment" standard that determines whether an

25 _____
26 ³ 47 U.S.C. § 252(a)(1) (emphasis added).

1 element is a UNE within Section 251(c)(3).⁴ Moreover, line sharing is not a Section 271
2 element. While Section 271(c)(2)(B)(iv) requires Bell Operating Companies ("BOCs") to
3 provide "[l]ocal loop transmission" unbundled from other parts of the network, a line sharing
4 arrangement does not provide a CLEC with "loop" transmission since the CLEC only has access
5 to a portion – the non-voice portion – of the loop. In its *Broadband Forbearance Order*,⁵ the
6 FCC permitted BOCs to forbear from providing line sharing under Section 271.

7 Second, the arbitration provisions in Section 252 confirm that the authority of a state
8 commission is limited to enforcing the requirements of Section 251 (b) and (c). If a CLEC and
9 an ILEC are unable to agree on the terms of an interconnection agreement through negotiations,
10 the "open issues" a state commission is permitted to arbitrate are limited to issues relating to the
11 implementation of Section 251.⁶ The arbitration process is limited to Section 251(a) and (b)
12 duties specifically because Section 252(a) requires an ILEC to negotiate only those duties. As
13 stated by the Eleventh Circuit, arbitration of items not within Section 251 would be "contrary to
14 the scheme and text of th[e] statute, which lists only a limited number of issues on which
15 incumbents are mandated to negotiate."⁷

16 Third, consistent with Section 252(a)(1), Section 252(e)(1) – the only other provision of
17 the Act that discusses the filing requirement – limits the obligation to file "interconnection
18 agreements" for review and approval to agreements that result from "negotiation" or
19 "arbitration." Because the "negotiations" and "arbitrations" required by Section 252 are limited

20 ⁴ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC
21 Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*,
22 CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC
Docket No. 98-147, 18 FCC 16978, ¶ 255, *et seq.*, Report and Order and Order on Remand and Further Notice of
Proposed Rulemaking (2003) ("TRO").

23 ⁵ *Petitions for Forbearance of Verizon, SBC, Qwest and BellSouth*, W.C. Docket No. 01-338, *et seq.*, Memorandum
24 and Opinion Order (Rel. Oct. 27, 2004) ("*Broadband Forbearance Order*").

25 ⁶ 47 U.S.C. § 252(b)(c)(1).

26 ⁷ *MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002).

1 to Section 251(b) and (c) duties, the "interconnection agreements" that must be filed under
2 Section 252(e)(1) are necessarily limited to agreements containing those duties.

3 Fourth, Section 252(e)(6), which provides for judicial review of state commission
4 determinations relating to interconnection agreements, limits judicial review to "whether the
5 agreement . . . meets the requirements of section 251 and this section." (emphasis added). If
6 Congress had intended to give state commissions the authority to review and approve agreements
7 that do not contain the duties listed in Section 251, it would not have limited judicial review in
8 this manner. It is a "fundamental canon of statutory construction that the words of a statute must
9 be read in their context and with a view to their place in the overall statutory scheme."⁸ "A court
10 must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme' and 'fit, if
11 possible, all parts into an harmonious whole.'"⁹ Here, it would be entirely asymmetrical to
12 assume that states are free to approve agreements that do not contain Section 251 obligations
13 when federal courts can only review agreements for compliance with the requirements of
14 "section 251 and this section."

15 Finally, as Qwest discussed in its briefs in support of its motion to dismiss, the FCC's
16 interpretation of the Section 252 filing requirement in the *Declaratory Order*¹⁰ is consistent with
17 the interpretation described herein. Thus, the FCC stated that "interconnection agreements," as
18 that term is used in connection with Section 252's filing requirements, are "only those
19 agreements that contain an *ongoing obligation relating to section 251(b) or (c)*."¹¹ The FCC
20 characterized this standard as properly balancing the right of CLECs "to obtain interconnection
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22 ⁸ *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

23 ⁹ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted).

24 ¹⁰ Memorandum Opinion and Order, *In the Matter of Qwest Communications International, Inc. Petition for*
25 *Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual*
Arrangements under Section 252(a)(1), WC Docket No. 02-89, 17 FCC Rcd. 19337, ¶ 8, n.26 (Oct. 4, 2002)
26 ("Declaratory Order").

¹¹ *Id.* at n.26 (emphasis added).

1 terms pursuant to section 252(i)” with the equally important policy of “*removing unnecessary*
2 *regulatory impediments to commercial relations between incumbent and competitive LECs.*”¹²
3 Because the Commercial Agreement does not contain terms relating to any ongoing obligations
4 relating to Section 251(c) or (b), the FCC's binding standard establishes that the Agreement is
5 not subject to the filing requirement.

6 **2. The Decision Of The Montana Federal District Court In *Qwest v. Montana***
7 ***Public Service Commission* Confirms That The Section 252 Filing**
8 **Requirement Does Not Apply To The Commercial Agreement .**

9 In *Qwest v. Montana Public Service Commission*,¹³ the Montana district court ruled that
10 the Montana Commission exceeded its authority and violated the Section 252 filing requirement
11 by ordering Qwest and a CLEC to submit for review and approval the same Commercial
12 Agreement at issue here. The Montana Commission had ruled that the Commercial Agreement
13 is an interconnection agreement subject to the Section 252 filing requirement even though it does
14 not contain any ongoing obligations relating to sections 251(b) or (c).

15 Relying on the plain language of Section 252, the Montana court ruled unequivocally that
16 the filing standard adopted by the Montana Commission is unlawful:

17 Having considered all of the parties' arguments, the Court concludes that
18 *section 252's language limits the requirement that agreements be*
19 *submitted to state commissions for approval to those agreements that*
20 *contain section 251 obligations.* Because line sharing, which is the
21 subject of Qwest's [commercial agreement] with Covad, is not an element
22 or service that must be provided under section 251, there is no obligation
23 to submit the [commercial agreement] to the PSC for approval under
24 section 252.¹⁴

25 The court explained further that its ruling striking down the Montana Commission's filing
26 standard also is required under the *Declaratory Order*. The court emphasized that in that Order,

24 ¹² *Id.* ¶ 8 (emphasis added).

25 ¹³ CV-04-053-H-CSO, Order on Qwest's Motion for Judgment on Appeal (D. Mont. June 9, 2005).

26 ¹⁴ *Id.* at 14 (emphasis added).

1 the FCC expressly concluded that "only those agreements that contain an *ongoing obligation*
2 *relating to section 251(b) or (c)* must be filed under section 252(a)(1)."¹⁵ The Montana
3 Commission, the court ruled, had improperly ignored and failed to give effect to this "clear
4 language of the Declaratory Order."¹⁶

5 Equally significant, the Montana court emphasized that its ruling invalidating the
6 Montana Commission's filing standard "is consistent with the intent of the [1996 Act]."¹⁷ The
7 court stated that "in enacting the [Act], [Congress] sought to promote competition by removing
8 unnecessary impediments to commercial agreements entered between ILECs and CLECs"¹⁸
9 Under the court's ruling, the Montana Commission's filing standard was precisely the type of
10 "unnecessary impediment" that Congress intended to eliminate.

11 The ruling of the Montana court applies directly to this case. For the same reasons that
12 the court concluded the Commercial Agreement did not have to be filed for approval by the
13 Montana Commission, the same Commercial Agreement should not be subject to approval by
14 this Commission.

15 **B. The FCC's *Wireline Broadband Order* Confirms That The Commercial Agreement**
16 **Is Not Subject To Review And Approval Under Section 252.**

17 Under the 1996 Act, interconnection agreements are available for "telecommunications
18 carriers," which are carriers that are providing telecommunications services.¹⁹ Thus, Section
19 252(a)(1) provides that upon receiving a request pursuant to Section 251, an ILEC "may
20 negotiate and enter into a binding agreement with the requesting *telecommunications carrier* or

21 ¹⁵ *Id.* at 15 quoting *Declaratory Order*, at ¶ 8, n.26 (emphasis added).

22 ¹⁶ *Id.*

23 ¹⁷ *Id.* at 16.

24 ¹⁸ *Id.*

25 ¹⁹ Section 153(44) of the Act defines a "telecommunications carrier" as "any provider of telecommunications
26 services."

1 carriers" (emphasis added). Section 252(b)(1), which addresses arbitrated interconnection
2 agreements, provides similarly that a "carrier" -- which is the same "telecommunications carrier"
3 referred to in Section 252(a)(1) -- may petition a state commission for arbitration of an
4 interconnection agreement.

5 Because interconnection agreements are, by definition, for telecommunications carriers
6 that are providing telecommunications services, the Commercial Agreement cannot be an
7 interconnection agreement subject to the Section 252 filing requirement if it does not involve
8 telecommunications services. In the *Wireline Broadband Order*, the FCC ruled in clear terms
9 that wireline broadband Internet access service is an information service, not a
10 telecommunications service: "[W]e conclude that wireline broadband Internet access service
11 provided over a provider's own facilities is appropriately classified as an information service
12 because its providers offer a single, integrated service (*i.e.*, Internet access) to end users."²⁰ The
13 FCC explained further that the classification of wireline broadband Internet access as an
14 information service applies regardless of whether the provider of the service uses its own
15 transmission facilities or those of another carrier.²¹

16 The purpose of the Commercial Agreement is to give Covad the access it needs to the
17 high capacity portion of the loop to provide wireline broadband Internet access service. Because
18 that service is not a telecommunications service, the Agreement does not involve or relate to a
19 telecommunications service and thus cannot be an interconnection agreement. There are thus
20 two reasons why the Agreement clearly is not an interconnection agreement subject to the
21 Section 252 filing requirement: (1) it does not contain any ongoing obligations relating to
22 Section 251(b) or (c) services, and (2) it does not involve or relate to telecommunications
23 services.

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25 ²⁰ *Wireline Broadband Order* at ¶ 14.

26 ²¹ *Id.* at ¶ 16.

1 In sum, Section 252(e)(1) expressly limits the filing requirement to "interconnection
2 agreements," instructing that "[a]ny *interconnection agreement* adopted by negotiation or
3 arbitration shall be submitted for approval to the State commission." (emphasis added). For the
4 reasons stated, the Commercial Agreement indisputably is not an interconnection agreement and
5 therefore is not subject to the Section 252 filing requirement.

6 **C. Rulings From Other State Commissions Confirm That The Commercial Agreement**
7 **Is Not Subject To Review And Approval Under Section 252.**

8 In a Final Order issued December 23, 2004, the New Mexico Public Regulation
9 Commission held that the same Commercial Agreement at issue here did "not have to be filed
10 under section 252(a)."²² Recognizing that line sharing is not within Section 251(b) or (c), the
11 New Mexico Commission concluded that the Commercial Agreement "does not create an
12 ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-
13 way, reciprocal compensation, interconnection, unbundled network elements, or collocation."²³
14 Based on this application of the filing standard from the *Declaratory Order*, the Commission
15 ruled that the Commercial Agreement is not within the Section 252 filing requirement.

16 The Washington Commission also ruled that the same Commercial Agreement is not
17 subject to the Section 252 filing requirement. The commission's analysis of the interrelationship
18 between Sections 252(a)(1) and (e)(1) is instructive:

19 Line sharing is no longer an unbundled network element within the meaning of
20 subsection 251(c)(3) Where, as here, the only network element a CLEC
21 requests from an ILEC is one that the FCC has removed from the list of required
22 elements under subsection 251(c)(3), the CLEC cannot be said to have made a
23 request for a network element "pursuant to section 251." *That is, because the*
agreement at issue concerns only line sharing, it is not an agreement within the
meaning of subsection 252(a)(1). Hence, it is not "an interconnection agreement
adopted by negotiation" within the meaning of subsection 252(e)(1). Therefore,

24 ²² Final Order, *In the Matter of an Agreement between Qwest Corporation and Covad entitled "Terms and*
25 *Conditions for Commercial Line Sharing Arrangements*, Case No. 04-00209-UT at 16 (N.M. Pub. Regulation
Comm'n, Dec. 23, 2004).

26 ²³ *Id.*

1 the line sharing agreement . . . is not one that requires our approval under the
2 Act.²⁴

3 Although it was not addressing the Section 252 filing requirement, the New York
4 Commission took a similar deregulatory approach to commercial agreements involving line
5 sharing in amending its guidelines for measuring and reporting inter-carrier service quality
6 performance.²⁵ In that proceeding Covad argued that Verizon is required to provide line sharing
7 under section 271 and, therefore, is obligated to measure and report line sharing performance
8 under the Commission's guidelines. The New York Commission rejected this argument on the
9 grounds that "Verizon's obligation to provide UNE-P, line sharing and line splitting is, for the
10 most part, eliminated" and went on to therefore hold that "the performance of UNE substitute
11 services provided *via commercial agreement* should not be reported" under the guidelines.²⁶

12 **D. The Arizona Commission's Order Requiring Review And Approval Of The Qwest
13 Platform Plus Agreement Is Distinguishable.**

14 In contending that the Commercial Agreement is subject to the Section 252 filing
15 requirement, Staff may argue that the Commission's decision in *In the Matter of the Application
16 of MCImetro for Approval of QPP Master Service Agreement*²⁷ ("QPP Docket") requires that
17 result. The Commission's decision in that proceeding, however, is distinguishable from this case
18 on multiple grounds. Indeed, at the open meeting on September 7, 2005, in which the
19 Commission ruled that the QPP Agreement at issue in that case was subject to the filing
20 requirement, the Commission's discussion distinguished the federal court's ruling in *Qwest v.
21 Montana Public Service Commission* on the ground that the Montana case involved line sharing.

22 ²⁴ Order No. 02: Dismissing Petition, *In the Matter of the Petition of Multiband Communications for Approval of
23 Line Sharing Agreement with Qwest Corporation Pursuant to Section 252 of the Telecommunications Act of 1996*,
24 Docket No. UT-053005, at ¶ 26 (W.U.T.C. April 19, 2005) (emphasis added).

25 ²⁵ See *Review Service Quality Standards for Telephone Companies*, Case 97-C-0139, 2005 WL 3239970
(N.Y.P.S.C. Dec. 1, 2005).

26 ²⁶ *Id.* at *3 (emphasis added).

27 ²⁷ Docket Nos. T-0105 1B-04-0540, T-03574A-04-0540, Decision No. 68116.

1 The discussion suggested that the Commission could have reached a different conclusion in the
2 *QPP Docket* if the agreement in that case had involved line sharing instead of switching and
3 shared transport. It is thus not surprising that three of the primary grounds for the Commission's
4 decision in the *QPP Docket* do not apply to line sharing and the Commercial Agreement.

5 First, the Commission determined that the QPP Agreement was subject to the Section 252
6 filing requirement "because the agreement's terms specifically address prices to be paid for
7 network elements under the definition set forth in 47 U.S.C. § 153" ²⁸ "Network element" is
8 defined in Section 153(29) as a facility or equipment used in the provision of a
9 *telecommunications service*." (Emphasis added). As demonstrated above, the *Wireline*
10 *Broadband Order* clearly establishes that Covad's use of line sharing to provide wireline
11 broadband Internet access service is not "the provision of a telecommunications service" but,
12 instead, is the provision of an information service. Accordingly, line sharing is not a network
13 element within Section 153(29), and that section cannot be relied upon here to impose a filing
14 requirement.

15 Second, the Commission also based its ruling in the *QPP Docket* on its conclusion that
16 the QPP Agreement refers to, and is therefore integrated with, the Qwest/Covad amendment to
17 their Section 252 interconnection agreement. ²⁹ The services under the QPP Agreement could be
18 used in combination with the loop from the interconnection agreement, and the rates for the QPP
19 services could increase or decrease inversely to the loop rate in order that the combination of the
20 QPP services and the loop remained constant over the term of the QPP Agreement. According to
21 the Commission, the QPP Agreement and the amendment to the interconnection agreement "are
22 not severable." ³⁰ The Commission reasoned, therefore, that since the amendment is subject to

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24 ²⁸ *Id.* at ¶ 7.

25 ²⁹ *Id.* at ¶¶ 9, 10.

26 ³⁰ *Id.*

1 the Section 252 filing requirement, so too is the "non-severable" QPP Agreement.³¹ In this case,
2 the line sharing service offered under the Commercial Agreement is not used in combination
3 with a section 251 service offered under the Qwest/Covad Section 252 interconnection
4 agreement, and the rates for line sharing do not increase or decrease in relation to any service
5 provided under the interconnection agreement. Accordingly, the rationale for the Commission's
6 ruling in the *QPP Docket* does not apply to the Commercial line sharing Agreement.

7 Third, in requiring Qwest and MCImetro to submit the QPP Agreement for review and
8 approval, the Commission also relied on the conclusion that the switching and shared transport
9 elements that are the subject of that agreement are among the network elements that BOCs are
10 required to provide under Section 271(c)(2)(B).³² According to the Commission, "it must be
11 presumed" that the review of agreements containing terms and conditions for access to Section
12 271 elements "was intended to occur within the context of a state commissions' Section 252
13 review process."³³ Here, in contrast to the QPP Agreement, the Commercial Agreement does not
14 involve a Section 271 network element, since, as discussed above, line sharing is not among the
15 elements BOCs are required to provide under Section 271.

16 For these reasons, there would be no conflict between a ruling in this case that the
17 Commercial Agreement is not subject to the Section 252 filing requirement and the
18 Commission's ruling in the *QPP Docket* that the QPP Agreement is subject to the filing
19 requirement.

20 Recent decisions from federal district courts in Colorado and Utah affirming rulings that
21 the QPP Agreement should be filed for review and approval also are not controlling.³⁴ For the

22 ³¹ *Id.*

23 ³² *Id.* at ¶ 11.

24 ³³ *Id.* at ¶ 12.

25 ³⁴ *Qwest Corporation v. Public Utilities Commission of Colorado*, Civil Action No. 04-D-02596-WYD-MJW, Order
26 (D. Colo. March 24, 2006) ("*Colorado Order*"); *Qwest Corporation v. Public Utilities Commission of Utah*, Case
No. 2:04-CV-1136 TC, Order and Memorandum Decision (D. Utah Nov. 14, 2005) ("*Utah Order*"). After issuing

1 same reasons discussed above in connection with this Commission's ruling in the *QPP Docket*,
2 the fact that these decisions did not involve a commercial agreement for line sharing
3 distinguishes them from this case. In addition, in each decision, the court determined that the
4 QPP Agreement is subject to review and approval by applying a filing standard that conflicts
5 with the *Declaratory Order* and the language of Section 252.

6 For example, the Utah court ruled that "any agreement entered into by competing carriers
7 that implicates issues addressed by the Act is an interconnection agreement" that must be filed
8 under Section 252.³⁵ The Colorado court ruled that an agreement devoid of any Section 251(b)
9 or (c) duties is nonetheless an interconnection agreement subject to the filing requirement.³⁶
10 These rulings, which Qwest has appealed to the Tenth Circuit, conflict directly with the language
11 of Section 252 discussed above and the FCC's ruling in the *Declaratory Order* that "only those
12 agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed
13 under 252(a)(1)"³⁷ This ruling by the federal agency charged with administering the Act,
14 not those of the Colorado and Utah courts that fail to give effect to the FCC's ruling, properly
15 implements the Section 252 filing requirement for the QPP Agreement.

16 The better reasoned decision relating to the QPP Agreement is that issued by the
17 Minnesota Commission. Its order, which reversed an earlier decision that the QPP agreement

18
19 the ruling that is the subject of the *Colorado Order*, the Colorado Commission's staff requested that Qwest file all
20 agreements with the Commission. Accordingly, Qwest filed a Commercial Line Sharing Arrangement with the
21 Colorado Commission "under protest and with reservation of rights, pending its appeal of the contested order in
22 Federal District Court." See Order Approving Amendment to Interconnection Agreement, *Re: The Application for*
23 *Approval of Interconnection Agreement between US West Communications, Inc. and DIECA Communications, Inc.*
d/b/a Covad Communications Company, Docket No. 99T-067, Decision No. C05-1442 at ¶ 1 (Col. Pub. Utilities
Comm'n Dec. 9, 2005). As discussed above, however, there are important differences between the QPP Agreement
and the Commercial Agreement which make the Colorado Commission's assertion of jurisdiction over the line
sharing agreement improper.

24 ³⁵ *Utah Order*, slip op. at 14.

25 ³⁶ *Colorado Order*, slip op. at 9.

26 ³⁷ *Declaratory Order* at ¶ 8 n.26.

1 must be filed, addressed the relationship between sections 252(a)(1) and (e)(1):

2 The Commission . . . continues to view the [agreement] as an interconnection
3 agreement since it involves the provision of network elements. However, the
4 Commission is persuaded that the term "interconnection agreement" *as used in*
5 § 252(e) is to be understood in relationship to § 252(a). Section 252(a) requires
an interconnection agreement to be submitted to State commissions under
subsection (e) only if the agreement results from a request for interconnection,
services, or network elements "pursuant to section 251."³⁸


6 Thus, in finding that the QPP Agreement is not subject to the filing requirement, the
7 Minnesota Commission concluded that (1) the "agreement[s]" that are the subject of section
8 252(a)(1) are *only* agreements entered "pursuant to section 251;" (2) the third sentence of section
9 252(a)(1) requires that only agreements for elements required by sections 251(b) or (c) must be
10 filed "under subsection (e);" and (3) subsection (e)(1) relates directly back to the filing
11 requirement of section 252(a)(1), and is thus limited to the same agreements.

12 III. Conclusion

13 For the reasons stated here and in Qwest's prior briefs submitted in this docket, the
14 Commission should determine that the Commercial Agreement is not subject to the filing and
15 review requirements of Section 252 and should close this docket.

16 DATED this 28th day of July, 2006.

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23
24
25 ³⁸ Order Releasing Agreement from Review, *Qwest Corporation and MCI metro Access Transmission Services*
26 *Amendment to Interconnection Agreement*, Docket No. P-5321, 421/IC-04-1178 at 2 (Minn. P.U.C. May 18,
2005)(italics in original).

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